Threats in the workplace and Bill 168 – arbitrator upholds termination

Bill 168 amended Ontario's *Occupational Health and Safety Act* to require employers to take numerous steps to prevent violence in the workplace. The full effect of Bill 168 is unknown, mainly because the amendments, in force since June 15, 2010, have yet to attract significant judicial or quasi-judicial consideration. However Arbitrator Newman recently considered, in some detail, Bill 168's changes to the legal landscape. Her decision indicates that the amendments have significantly affected workplace law in Ontario, particularly with respect to how employers, supervisors, workers, adjudicators, arbitrators and judges must view threats of violence in the workplace.

The Corporation of the City of Kingston and Canadian Union of Public Employees, Local 109 (August 2011) involved the grievance of an employee who was terminated after 28 years' of service for uttering a death threat to a fellow employee. The employment relationship had always been tense. There was a history of angry confrontations between the 47-year-old grievor and her supervisors and co-workers. She admitted to having problems managing her anger and had received counselling in the past.

The culminating event occurred in July 2010 when the grievor was alleged to have threatened the life of the union's local president. Although there were no witnesses and the grievor denied uttering the threat, the employer concluded, after investigating, that the threat had occurred. The employer took the position that the violent conduct irretrievably damaged the employment relationship and that, in light of the Bill 168 amendments and the seriousness of the incident, it had no choice but to terminate the grievor's employment.

The union grieved the dismissal on the basis that Bill 168 did not legislate zero tolerance for misconduct, nor did it supplant the common law requirements of progressive discipline, and proportionality, in responding to misconduct. In the union's view, the decision to terminate was premature and was based on an unproven perception of danger.

THE EFFECT OF BILL 168 IN CASES INVOLVING THREATS IN THE WORKPLACE

Arbitrator Newman began her analysis by considering the purpose of Bill 168. The reforms were based on the hindsight provided by inquests into the deaths of victims of workplace violence. The legislation's aims were to enable workplace parties to be aware of workplace violence, and to react appropriately in order to enhance overall workplace safety. The arbitrator pointed out that workplace safety is so vitally important it even "trumps" personal privacy. Under the Bill 168 amendments, employers are required to

provide information, including personal information, to a worker, if the worker is likely to encounter an individual with a history of violent conduct and if the worker is likely to be exposed to physical injury.

The arbitrator considered whether the termination was an appropriate and proportionate disciplinary response to the grievor's misconduct. She discussed the effect of the Bill 168 amendments in cases involving threats of violence in the workplace. In her view, there are four fundamental ways in which Bill 168 impacts such cases.

THREATENING LANGUAGE IS "WORKPLACE VIOLENCE"

First, Bill 168 clarifies that using threatening language in the workplace falls into the new category of workplace violence for the purposes of the Ontario's *Occupational Health and Safety Act* (the "OHSA"). Where there is an allegation of a threat in the workplace, the parties must address the allegation as one of violent misconduct. Arbitrator Newman pointed out that there need not be evidence of an immediate ability to do physical harm, or even evidence of intent to do harm. The workplace violence in such cases is the utterance of the threatening words.

EMPLOYERS REQUIRED TO FULLY INVESTIGATE AND REACT APPROPRIATELY

Second, Bill 168 has changed the manner in which workplace parties must respond to an allegation of a threat in the workplace. Workers and supervisors are required to report incidents of workplace violence. The employer is required to investigate the incident in a full and fair manner. The employer's response must be informed, reasonable and proportionate. The arbitrator clarified that this obligation is not to be construed as requiring *automatic* termination for misconduct. In this respect the arbitrator agreed with the union's position, stating:

> There is nothing in the Occupational Health and Safety Act that requires that an employee, found to have committed an act of workplace violence, be automatically terminated. This is not legislation of zero tolerance. It is not legislation that expressly restricts arbitral discretion in assessing the appropriateness of penalty.

However, the employer cannot be passive or indifferent to reports of workplace violence. Such inaction would constitute "an abrogation of the employer's obligations under the OHSA, and would expose that employer to the penalties and offences set out in that Act."

"SERIOUSNESS OF THE INCIDENT" GIVEN GREATER WEIGHT

Third, Bill 168 has affected how an arbitrator might assess the reasonableness of termination when a threat is found to have been made. Whether termination is reasonable

in the circumstances is assessed by considering the factors outlined in *Dominion Glass Co. and United Glass and Ceramic Workers, Local 203,* (1975):

- Who was threatened or attacked?
- Was this a momentary flare-up or a premeditated act?
- How serious was the threat or attack?
- Was a weapon involved?
- Was there provocation?
- What is the grievor's length of service?
- What are the economic consequences of a discharge on the grievor?
- Is there genuine remorse?
- Has a sincere apology been made?
- Has the grievor accepted responsibility for his or her actions?

The arbitrator said these factors continue to apply, albeit with a potentially greater weighting afforded to the seriousness of the incident, as a result of Bill 168. The Bill 168 amendments were seen by the arbitrator to have elevated the seriousness of threats of violence to the level of actual violence. This means that an arbitrator may be inclined to give greater weight to the seriousness of the incident than other factors.

"WORKPLACE SAFETY" AN ADDITIONAL FACTOR

Finally, the Bill 168 amendments add an additional factor to those normally considered when assessing the reasonableness and proportionality of the discipline. Arbitrator Newman identified this additional factor as "workplace safety." She stated this requires a determination of whether the misconduct is likely to be repeated. Arbitrator Newman explained:

> That element of inquiry is required, in light of the amendments, because the employment relationship will be incapable of reparation, if the offending employee is likely to render the employer incapable of fulfilling its obligation to provide a safe workplace under The Occupational Health and Safety Act.

In applying the post-Bill 168 framework to the facts before her, Arbitrator Newman gave considerable weight to the grievor's 28 years' of service. She stated that this was the most compelling factor militating against termination. However the grievor's significant length of service was undermined by the grievor's conduct and evidence at the hearing. The grievor never seemed to accept responsibility for her misconduct. She did not demonstrate any appreciation of the seriousness of her actions, or show any remorse. In addition, she provided no evidence that she had tried to alter her behaviour. This was seen to render the employment relationship unworkable, since the likelihood of a repetition of events seemed possible.

Turning to the employer's conduct, Arbitrator Newman found that the employer reacted with the appropriate deliberateness required in the circumstances. The employer investigated the incident and involved senior levels of management in determining the appropriate response. The arbitrator dismissed the grievance after concluding that termination was appropriate and proportionate in the circumstances.

In Our View

This early interpretation and application of the Bill 168 amendments clearly demonstrates that employers must react quickly and appropriately when there is an allegation of workplace violence, including threats of violence. Employers must investigate such allegations in a thorough and fair manner. The common law requirements of reasonableness and proportionality in responding to misconduct continue to apply. However this decision indicates that serious discipline, including termination, will often be accepted as appropriate in situations involving threats in the workplace.

Employer's management rights upheld in the face of privacy complaints

It is well-established that an employer, through its general management rights, can implement methods for recording the working time of employees. This right is subject to legislation and the terms of the applicable collective agreement. Although this right is fairly uncontroversial, when new time-tracking technology is introduced, employees and unions often raise privacy concerns. A recent decision from an arbitrator in British Columbia provides valuable guidance to employers about the general management right to introduce new technologies for efficiency, and about obligations in respect of employees' privacy concerns.

In *Otis Canada Inc. v. International Union of Elevator Constructors, Local 1 (Telematics Device Grievance)* (August 2010) the employer was in the business of installing and maintaining elevators. Many of its employees were mechanics who used company vehicles to travel to sites to repair or maintain elevators. Such employees were permitted to use the vehicles to travel to and from work, but were otherwise prohibited from using company vehicles for personal use.

THE INSTALLATION OF TELEMATIC DEVICES

The dispute arose in 2009 when the employer installed electronic telematic devices in its vehicles. The employer's rationale for the installation of the devices was to improve fleet efficiency. The telematic devices communicate through satellite technology to provide information to the employer about trip start and stop times, duration times, and idle times. This information was available to selected members of management, along with the name of the particular mechanic who was driving the vehicle. Although the telematic devices were not GPS-enabled, the employer could make approximate assessments of employees' movements using the vehicle information from the telematic devices.

The union filed a grievance challenging the intrusion into employees' privacy. The union argued that the devices collected personal information of the employees, contrary to British Columbia's privacy legislation, the *Personal Information Protection Act* ("PIPA").

TELEMATIC DATA NOT PERSONAL INFORMATION

The arbitrator began his analysis by considering the definition of "personal information" in PIPA:

> "personal information" means information about an identifiable individual and includes employee personal information but does not include

(a) contact information, or
(b) work product information;

The arbitrator noted that the information collected by the employer from the telematic devices was intended to reduce fleet costs. He cited evidence that fuel usage and maintenance costs were reduced significantly following the installation of the devices.

A second purpose for the data was to monitor employee use of company vehicles. This purpose was limited by the fact that the devices were not GPS-enabled and could not provide the exact location of vehicles. This meant that the employer had to "connect the dots" in order to track an employee's movements. This could be done by combining the telematic information with other information known by the employer, such as where the employee lived, and how long it should take the employee to get to work. The employer made it clear that the telematic information could be used to identify discrepancies in employee travel times. However the employer recognized that where such discrepancies were identified, further investigation would be required—including interviewing the employee—prior to disciplinary action.

Based on the applicable arbitral jurisprudence, the arbitrator said the fact that the telematic information could be used to evaluate the performance of employees did not convert that information into "personal information" for the purposes of PIPA. On this point, the arbitrator relied on the decision from *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board) and NAV Canada*, (2006) ("*NAV Canada*"):

> But the information does not thereby qualify as personal information. It is not <u>about</u> an individual, considering that it does not match the concept of "privacy" and the values that concept is meant to protect. It is <u>non</u>-personal information transmitted <u>by</u> an individual in job-related circumstances.

It was the arbitrator's view that the only personal information collected by the employer through the telematic device was the name of the vehicle operator. All the other telematic information related to the vehicle itself. Since the telematic information did not include personal information, there was no violation of PIPA.

The arbitrator then went on to discuss the employer's general management rights. He stated:

> The Employer in this arbitration is entitled to know what its employees are doing when they are working and when they are using company vehicles. This information assists management by providing reliable and objective information to improve the efficiency of the vehicle fleet. The same

> information is not "about" an individual employee and it may be used as part of Employer investigations of disciplinable offences without violating the privacy of employees. As stated in *Nav Canada*, *supra*, information that is transmitted by an individual in job-related circumstances is not information about that individual.

The arbitrator concluded by noting that the introduction of the devices was primarily aimed at improving the efficiency of the employer's fleet. Although the telematic devices contained the name of the vehicle operator, the remaining information was specific to the vehicle. It was not considered to be information that is intimate to the individual or inherently personal. The fact that the employer could use the telematic information to determine if its employees were using vehicles for personal use did not transform the information into "personal information" for the purposes of PIPA. The grievance was therefore dismissed.

In Our View

This case makes it clear that the exercise of the general management rights of employers, although subject to applicable legislation and collective agreements, is sometimes permitted to encroach on employees' privacy. An employer is permitted to implement methods to achieve efficiency and monitor the working time of employees. Notwithstanding the positive message for employers, organizations must still exercise caution when implementing new technologies in the workplace that could be seen to intrude on employees' privacy. Such technologies should, as much as possible, minimally intrude on employees' privacy. In addition, there must be legitimate operational goals underlying the introduction of the new technology. Employers contemplating implementing new technology should consider providing adequate notice of the change and should consult with employees and unions.

Employer entitled to require independent medical examination prior to employee's return to work

A recent arbitral decision confirms an employer's right to require employees to undergo independent medical examinations in certain circumstances.

In *Peel Regional Police Services Board v. Peel Regional Police Assn.* (April 2011) the Peel Regional Police Association (the "Association") filed a grievance alleging that the employer had failed to accommodate an employee's medical restrictions when it refused to allow the grievor to return to work after a short-term disability leave.

The employer required the grievor to undergo an independent medical examination ("IME") so it could fully understand the nature of the grievor's restrictions. The grievor refused, insisting on the restrictions and recommendations of his own psychiatrist. Arbitrator Trachuk dismissed the grievance, stating that the employer had just cause to require the IME prior to a return to work.

THE MEDICAL RESTRICTIONS

The grievor had been a constable with the Peel Regional Police Service since 1989. On May 6, 2009, a confrontation occurred between the grievor and his supervisor. Following the confrontation, the grievor took sick leave. He provided a note from his psychiatrist, Dr. Kruger, to support his absence. On June 18, he gave his employer a Job Modification Questionnaire ("JMQ"), filled out by Dr. Kruger, which stated that the grievor had several psychological restrictions. These included restrictions with respect to teamwork, deadlines, and multi-tasking, as well as limitations with respect to exposure to emotional or confrontational situations, and irregular shifts and extended hours.

The employer sought additional information from the psychiatrist. It requested Dr. Kruger's opinion as to: whether the grievor was able to fully cope with the duties of a police officer; when the grievor would be able to function fully in the role of police officer; and the duration of the restrictions.

Dr. Kruger advised that clinical assessments were ongoing and that the grievor's condition would be observed over the next 60 days. In October, Dr. Kruger advised that the grievor's difficulties stemmed not from his duties as a police officer, but were the result of confrontations with supervising officers. He advised that the grievor could return to work with the accommodation of placement in a job that would avoid confrontation with supervising officers.

The employer was concerned about its ability to accommodate such a restriction. In its view, the potential for conflict with a supervisor was inherent in the employment relationship, regardless of the position held, or the duties assigned. The employer requested that the grievor undergo an IME in the form of a psychiatric/psychological assessment. The employer wanted to clarify the unresolved issues relating to the grievor's restrictions and the necessary accommodations.

The Association took the position that there was no need for an IME, but that the parties should meet to consider what jobs were available that would suit the medical restriction suggested by Dr. Kruger. The employer stated that there were no unsupervised jobs that could eliminate the risk of confrontation. It therefore could not accommodate the grievor's restriction. The employer reiterated its request for an IME. The grievor refused and filed a grievance in November 2009, alleging that the employer failed to accommodate his medical restrictions, contrary to the collective agreement, the Ontario *Human Rights Code*, and the *Police Services Act*.

SUBSEQUENT IME REVEALS NO NEED FOR ACCOMMODATION

When the hearing of the grievance began, the parties agreed to an IME with a mutually-selected doctor.

The results of that assessment were that the grievor met the criteria for "Anxiety Disorder Not Otherwise Specified", but that his condition did not require accommodation. The independent doctor's conclusion was that there were no psychiatric restrictions on the grievor returning to work. As a result the grievor returned to work without any of the previously requested restrictions. In the arbitrator's view, this series of events indicated that there was no issue about whether the employer failed to accommodate the grievor:

> An employee has the right to be accommodated in his work if he has a disability which prevents him from working without that accommodation. However, the right to be accommodated flows from the existence of a disability. An employer has no duty to accommodate an employee who is not disabled or whose disability does not require accommodation. Since the grievor does not have a disability which requires accommodation, the Board had no obligation under the *Human Rights Code* or the *Police Services Act* to accommodate him.

The grievor nevertheless sought compensation for the period he was absent, on the basis that the employer's insistence on an IME was unfair and adversely affected his income. Under the collective agreement, the employer was prohibited from dealing adversely with a member of the association without reasonable cause.

THE ARBITRATOR'S DECISION

The arbitrator noted that the issue before her was whether the employer had just cause, and acted fairly, when it refused to return the grievor to work without an IME. She noted that:

> Requiring an employee to undergo a psychiatric IME is a significant invasion of his or her privacy. It will only be justified when there is very good reason to doubt the medical information provided by an employee's own psychiatrist. However, an employer is entitled, in fact obligated, to ensure that an employee is fit to return to work after an extended illness.

A PATTERN OF CONFRONTATION, ILLNESS, AND REQUESTS FOR ACCOMMODATION

The arbitrator found that the employer's decision to require an IME was informed by the grievor's history of absence and illness. According to the employer, since 2002, the grievor had eight episodes of illness – all of which resulted in an inability to work for substantial periods of time. The episodes generally followed a heated disagreement with a supervisor or co-worker. The arbitrator noted that this pattern included subsequent requests by the grievor to be placed in a different job with a different supervisor each time he returned to work. The employer repeatedly accommodated these requests. However in light of the pattern, the employer sought more information following the 2009 incident. In the arbitrator's view, the employer's request for an IME was reasonable, based on the grievor's history of illness and requests for accommodation.

THE DOCTOR AS "ADVOCATE" FOR THE EMPLOYEE

The arbitrator found that the board's decision to require an IME was also due, in part, to the concern that Dr. Kruger had increasingly become an advocate for the grievor. This raised doubts about his reports and recommendations. The arbitrator reviewed many of the psychiatrist's letters over the years and found that he had increasingly become a "conduit" for his patient's issues and complaints about the employer. The arbitrator stated:

> However, there comes a point where a report from a doctor who has become an advocate can be legitimately questioned. That point is reached when his or her objectivity is in doubt or when his or her reports appear to have become conduits for an employee's complaints about the employer. When that happens, an employer may be justified in seeking an independent medical opinion through an IME.

THE NATURE OF THE RESTRICTIONS

The employer's request for an IME was also reasonable due to the nature of the restrictions suggested by Dr. Kruger. The arbitrator found that the restrictions were very significant for a police officer, in particular those related to avoiding emotional or confrontational situations.

When the employer sought additional information from Dr. Kruger, it received mixed messages. On the one hand, Dr. Kruger stated that the grievor was not disabled and could return to work. On the other hand, he asked that the grievor's job be modified to avoid the potential for confrontation with supervising officers, and that supervising officers be educated in order to avoid confrontations. In the arbitrator's view, Dr. Kruger did not clear the grievor to return to work without restrictions, and the recommendations could not be accepted by any employer without serious investigation.

For the above reasons, Arbitrator Trachuk found that the employer had just cause to refuse to return the grievor to work without an IME. In the arbitrator's view, the employer did not act unfairly in exercising its management rights. The grievance was dismissed.

In Our View

This decision strikes the appropriate balance between the privacy concerns of employees and the legitimate need of employers to ensure that an employee is able to return to work after an absence due to a medical condition. The decision confirms that an employer may insist on an IME where there is a history of absences and accommodation requests, and where there is a reasonable basis to conclude that the employee's doctor has crossed the line from physician to advocate.

Excessive and inappropriate Internet use – serious misconduct but not 'time theft'

It is not uncommon for employees to use their employer's Internet system for personal reasons. In many workplaces there is an implicit, or sometimes explicit, understanding that employees will use the Internet for online banking, personal e-mails, and even social networking. The question for employers is: at what point does an employee's personal Internet use become so excessive and inappropriate that the employee may be disciplined? A recent adjudication decision indicates that this threshold may be higher than many employers would expect.

In *Andrews v. Deputy Head (Department of Citizenship and Immigration)* (August 2011), Franklin Andrews, the grievor, was dismissed by the federal government in November 2009. The termination followed an investigation by the employer which revealed that throughout lengthy periods in 2008 and 2009 the grievor spent between 50 per cent and 75 per cent of his workday browsing the Internet for non-work-related purposes. To make matters worse, large amounts of this time were spent looking at sexually explicit images and pornography.

The grievor was candid and cooperative during the employer's investigation. He admitted to the misconduct, showed remorse, and offered the explanation that he simply did not have enough work to do. He claimed that there were never any issues with his performance, and that since no one knew of the materials he was accessing, no one was affected.

The employer nevertheless discharged the grievor, setting out its grounds as follows:

1. Inappropriate use of government property and equipment, including the use of the Department's Internet and electronic network systems for non-work-related purposes including viewing and/or searching of objectionable material including electronic images of a sexually suggestive nature; and

2. Misuse of government property and equipment, including the excessive use of the Department's Internet and electronic network systems for non-work-related purposes.

Andrews grieved the dismissal. He did not dispute the essential facts, but argued that terminating his employment was disproportionate to the offence. In the grievor's view, the employer failed to take into account significant mitigating factors, including:

- the grievor's 27 years' of service;
- a clean disciplinary record;
- exemplary performance reviews;
- the grievor's candour and cooperation during the investigation; and
- his acceptance of responsibility for his actions and remorse.

The employer argued that the discharge was justified because the grievor's conduct was clearly "time theft." Although the employer acknowledged that time theft generally involves fraudulent acts, such as falsifying time-cards, it claimed that the concept of time theft should not be unduly restricted. The evidence showed that the grievor "sat at a desk surfing the Internet for half the day, day after day and month after month, claiming pay for time not worked…" In the employer's view, this was as fraudulent as falsifying a time-card.

IS EXCESSIVE INTERNET USE 'TIME THEFT'?

Since the grievor admitted the acts alleged by the employer, the issue for the adjudicator was whether the penalty of discharge was reasonable. Adjudicator Rogers began by addressing whether excessive non-work-related use of the employer's Internet was time theft.

She noted that in time theft cases, the impugned conduct usually indicates a fraudulent intent to steal time. She mentioned the example of an employee punching another employee's time card. In such a case there is no mistaking the intent to steal time. She contrasted this with the grievor's circumstances:

> But in an environment in which personal use of the employer's Internet services is permissible on an employee's own time and in which employees do not punch time cards or actively record their working hours, it becomes much more difficult to infer the requisite intent for a charge of time theft. I simply do not see excessive use of the employer's Internet services for non-work-related purposes as the beginning of a continuum that ends with time theft. I believe that fraudulent intent is a fundamental element in the offence of time theft, but it is not in an allegation of misusing the employer's Internet services.

SIGNIFICANT DISCIPLINE NECESSARY

It was clear that the grievor's conduct, while not time theft, was still very serious. Adjudicator Rogers rejected the grievor's argument that there was no prejudice to the employer's operations from the conduct. She stated:

> The grievor violated a number of employer policies, clearly misused the property and equipment that he was entrusted to use for work purposes,

> and engaged in behaviour that has no place at work. …The fact that the grievor's behaviour took place not once or twice but daily over many months is an aggravating factor, in my view, and one that makes significant discipline necessary.

In assessing the appropriate disciplinary response, the adjudicator examined the underlying purposes of workplace discipline. She noted that deterrence is an important factor in determining discipline, but not the only one. The potential to correct, and rehabilitate the employee is also an important consideration that should not be lost to "heavy-handed" discipline. Other factors, such as the length of service, the grievor's disciplinary record, the nature of the offence, and the grievor's credibility and remorse, all bear upon the employee's future prospects for acceptable behaviour.

In considering this host of factors, the adjudicator gave considerable weight to the grievor's length of service (27 years), his clean disciplinary record, and his positive work performance. She stated, "if past behaviour is a reasonably good predictor of future behaviour, then, based on the grievor's past performance over many years, the grievor is capable of being a good employee in the future."

Other factors that were persuasive to the adjudicator included the grievor's acceptance of responsibility, his acknowledgement of guilt, and his remorse. She commented "an employee who frankly and openly acknowledges his or her fault is less likely to repeat the offence than one who denies having done anything wrong."

The adjudicator concluded that the penalty of discharge was not reasonable in the circumstances and reinstated the grievor. Nevertheless, the misconduct was serious and warranted a proportionate response. Since the grievor had spent seven months being paid for work he was not doing, she imposed a lengthy without-pay suspension running from the date of discharge, November 2009, to the date of her August 2011 decision.

In Our View

Determining the appropriate discipline for an employee's inappropriate use of workplace technology can be challenging for management. One of the frequent problems, also evident in the *Andrews* decision, is that many employers have not implemented workplace policies that address the specific issues that can arise. In the *Andrews* case, although the employer implemented policies relating to inappropriate Internet use, it did not specify what would constitute *excessive* use warranting discipline. Without specificity, very often the "benefit of the doubt" is given to employees, particularly long-serving ones. Organizations should review their Internet use policies and consider whether the employer's expectations are clearly laid out.